

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2628

Cir. Ct. No. 2015TR342

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF STEVEN N. JACKSON:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN N. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
SCOTT L. HORNE, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.¹ In January 2015, Steven Jackson was issued a notice of intent to revoke operating privilege after he was arrested for operating while under the influence (2nd) and refused to submit to a blood test.² After a refusal hearing in December 2015, the circuit court entered a judgment finding Jackson guilty of improperly refusing a blood test and revoking Jackson’s operating privilege for twelve months.³

¶2 Jackson appeals, arguing that: (1) the officers lacked probable cause to arrest him for operating while under the influence; and (2) the circuit court erred in admitting a squad car videotape recording at the refusal hearing as evidence that the arresting officer complied with the statutory Informing the Accused requirements and that Jackson refused to submit to a blood test. For the reasons set forth below, I conclude that probable cause did exist to arrest Jackson, and that it was not error for the circuit court to admit the squad car recording. Accordingly, I affirm the judgment.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² See WIS. STAT. § 343.305(9)(a) (“If a person refuses to take a [blood] test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke ... the person’s operating privilege.”).

³ See WIS. STAT. § 343.305(9)(a)5. (“[T]he issues of the hearing are limited to” whether there was probable cause to believe that the person was operating a motor vehicle “while under the influence,” whether the officer complied with the statutory Informing the Accused requirements, and whether the person refused a blood or other chemical test); WIS. STAT. § 343.305(10)(a) (“If the court determines [after a hearing] that a person improperly refused to take a [blood] test ... the court shall proceed under this subsection.”); and WIS. STAT. § 343.305(10)(b)2. (“for the first improper refusal, the court shall revoke the person’s operating privilege for one year.”).

BACKGROUND

¶3 On January 28, 2015, a notice of intent to revoke operating privilege was issued to Jackson under the name of Sergeant James Jacobson. The notice reads in part:

I, a law enforcement officer, requested you, [Jackson], to submit to one or more chemical tests under s. 343.305(9) Wisconsin Statutes.... [P]rior to the request, an officer placed you under arrest for a violation of the following Wisconsin state statute or a local ordinance conforming to that statute: 346.63(1)(a) OPERATING WHILE UNDER THE INFLUENCE (2ND).

....

I complied with s. 343.305(4) Wis. Stats., by reading you form SP4197, the Informing the Accused form, and provided a copy of that form to you. You refused a request to submit to a test or tests under 343.305(3) Wis. Stats. Because of this refusal, your operating privilege may be revoked.

You have 10 days from the date of this notice to file a request for a hearing on the revocation with the court named below.... If you do not request a hearing, the court must revoke your operating privileges 30 days from the date of this notice.

¶4 This notice reported the date of the refusal as January 3, 2015.

¶5 On February 5, 2015, Jackson filed a “Request for Refusal Hearing” with the La Crosse County circuit court. Jackson attached to his request the above-quoted notice of intent to revoke operating privilege.

¶6 The circuit court held the refusal hearing on December 1, 2015. Deputy Jorrey Olson from the La Crosse County Sheriff’s Department was the only witness to testify at the refusal hearing. According to Olson, at approximately 2:30 a.m. on January 3, 2015 (a Saturday), Olson was dispatched to

the scene of a motor vehicle accident, where he found a truck registered to defendant Steven Jackson abandoned on the roadside, “smashed against a telephone pole.” Olson also saw footprints in fresh snow from the driver’s side of the truck only, and indications that the truck had run off the road and struck a sign approximately two hundred feet down the road before striking the telephone pole. Olson then went to Jackson’s residence, where he arrived to find that Sergeant Jacobson was already there, and where he met Jackson. Olson observed an odor of intoxicants emitting from Jackson; Jackson’s red, bloodshot, and glassy eyes; and rips, a blood stain on Jackson’s shirt, and red bumps on Jackson’s head, consistent with a person who was involved in a motor vehicle accident.

¶7 Olson witnessed Jacobson interview Jackson, conduct field sobriety tests, and obtain the result of a preliminary breath test. Olson observed that Jackson’s balance and coordination were impaired, that Jackson had difficulty reciting the English alphabet, and that the result of the preliminary breath test was well above .08. Olson observed Jacobson arrest Jackson and leave with Jackson, with no other person in Jacobson’s squad car, to transport Jackson to a hospital for an evidentiary blood draw.

¶8 Sergeant Jacobson died before the refusal hearing was held. As evidence of what transpired after Jacobson arrested Jackson and left with Jackson in his squad car, the State played approximately three minutes of a squad car videotape recording. The video portion of the tape shows a parking lot at night. The audio portion includes a voice reading to a person named “Steven” the Informing the Accused language set forth in WIS. STAT. § 343.305(4), explaining the consequences of refusing to submit to a blood test requested by law enforcement, and asking “Steven” to submit to a blood test.

¶9 Specifically, the recording begins:⁴

Voice 1: OK, Steven, I need you to listen to me, alright?

Voice 2/Steven: Yep.

Voice 1: I'm right here, talkin' about refusal?

Voice 2/Steven: Yep.

Voice 1: I want you ... to listen, I'm gonna read to you the Informing the Accused to you, okay?

Voice 2/Steven: 'Kay.

Voice 1: Under Wisconsin's implied consent law, I am required to read this notice to you.

[Statutory language follows.]

After the statutory language is read, Voice 1 asks "Steven" more than once if he will consent to submit to a blood test, and "Steven" refuses each time.

¶10 Olson testified that the voice he heard on the recording reciting the Informing the Accused language was Jacobson's. Olson testified that the recording was from "the video systems for our squad cameras" and that the "officer designation 103 Jacobson" on the recording referred to Sergeant Jacobson and his squad car. Olson testified that the date and time on the recording corresponded with the date and time that Jacobson transported Jackson to the hospital, and that Jackson was the only person arrested and placed in Jacobson's squad car at that date and time.

⁴ These excerpts are based on what I heard when I listened to the recording that was admitted and played at the refusal hearing; there is no transcription of the recording in the record.

¶11 The circuit court admitted the recording as properly authenticated. At the close of the hearing, the court concluded that probable cause supported Jackson’s arrest for operating a motor vehicle while impaired by alcohol. The court found “that Sergeant Jacobson complied with the requirements of the Informing the Accused statute and that Mr. Jackson, when given the choice of submitting to the test ... twice refused.” The court concluded “that the refusal was improper [and] that the [statutory] requirements had been met,” and ordered a twelve-month revocation of Jackson’s driver’s license.

DISCUSSION

¶12 Jackson makes two arguments on appeal: (1) the circuit court erred in finding that probable cause existed to arrest Jackson; and (2) the circuit court erred in admitting the squad car videotape recording at the refusal hearing as evidence that Jacobson complied with the statutory Informing the Accused requirements and that Jackson refused to submit to a blood test. I discuss and reject each of these arguments below.

I. Whether probable cause existed to arrest Jackson

¶13 Whether undisputed facts constitute probable cause is a question of law that this court reviews without deference to the circuit court. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause exists when the totality of the circumstances, within the arresting officer’s knowledge at the time of the arrest, is such that a reasonable police officer would believe that the defendant probably operated a vehicle under the influence of an intoxicant. *State v. Babbitt*, 188 Wis. 2d 349, 356-57, 525 N.W.2d 102 (Ct. App. 1994). The court applies an objective standard, “considering the information available to the officer

and the officer's training and experience.” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

¶14 Turning to the undisputed facts in this case, there were two accidents involving Jackson's truck with footprints leading away from the driver's side of the vehicle at the site of the second accident, and Deputy Olson observed rips, a blood stain on Jackson's shirt, and red bumps on Jackson's head consistent with his having been in a motor vehicle accident. From these facts, it can reasonably be inferred that Jackson was operating his truck at the time his truck “smashed” against a telephone pole.

¶15 In addition, Olson observed physical signs that caused him to believe that Jackson was impaired at the time of the accident. Jackson smelled of intoxicants and had “red, bloodshot and glassy” eyes. Olson also observed Jackson perform the field sobriety tests, observed that Jackson's balance and coordination were impaired, and that Jackson could not accurately recite the alphabet. It was also around bar time on the weekend. *See Lange*, 317 Wis. 2d 383, ¶¶4, 32 (recognizing police contact around bar time “during the weekend when [people] do not have to go to work the following morning” as supporting probable cause to arrest for operating a motor vehicle while under the influence of an intoxicant).

¶16 Finally, Olson observed that Jackson's preliminary breath test result indicated that Jackson's blood alcohol level was significantly over the legal limit. *See WIS. STAT. § 343.303* (stating that the result of a preliminary breath test may be used by an officer for the purpose of deciding whether or not the person shall be arrested for operating while under the influence).

¶17 Based on all of these facts taken together, the totality of the circumstances would lead a reasonable police officer to believe that Jackson was probably operating his truck while under the influence, and, therefore, the officers had probable cause to arrest Jackson.

¶18 Jackson argues that it cannot be reasonably inferred from the facts set forth in ¶14 above that Jackson was driving his truck when it struck the telephone pole. Specifically, he asserts that the ripped shirt, blood stains, and bumps may be related to things other than that accident, that “Olson never indicated that Mr. Jackson appeared to have been in an accident,” and that “there were no statements or observations made suggesting that Mr. Jackson was driving.” Contrary to Jackson’s assertion, Olson did testify that what he observed was consistent with Jackson’s being involved in a motor vehicle accident, and the circuit court was entitled to draw reasonable inferences from all of the facts before it and to reject Jackson’s alternative explanations, based on no facts, for Olson’s observations.

¶19 Jackson also argues that Olson’s testimony failed to establish that Jackson was impaired because Olson’s assertions were conclusory, Olson did not know the specific result of the preliminary breath test, and Olson did not know the specific clues of impairment Jackson exhibited during the field sobriety tests. However, Olson specifically observed that Jackson emitted the odor of an intoxicant and had bloodshot and glassy eyes, that Jackson’s balance and coordination were impaired and that he did not correctly recite the alphabet, and that the result of the preliminary breath test was above .08. That Olson did not remember the exact result does not undermine his testimony that the result was above the legal limit.

¶20 As for the field sobriety tests, this court has previously explained that field sobriety tests are observational tools, “not litmus tests that scientifically correlate certain types or numbers of ‘clues’ to various blood alcohol concentrations.” *City of West Bend v. Wilkens*, 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324. In other words, field sobriety tests give officers an opportunity to look for indicia of intoxication without employing a scientific test. *Id.* We treat an officer’s observations with respect to field sobriety tests as we do any other observations of indicia of intoxication by the officer. *Id.*, ¶19. Here, Olson saw that Jackson had difficulty with balance and coordination and remembered that Jackson “did not perform particularly well in the tests.” There is no reason to discount these observations just because they do not include the specific clues that Jackson exhibited.

¶21 In sum, Jackson’s argument that the officers lacked probable cause to arrest him fails.

II. Whether the circuit court erred in admitting the videotape recording into evidence

¶22 Jackson argues that the circuit court erred in admitting the squad car videotape recording offered by the State to establish that Sergeant Jacobson, who had died before the refusal hearing, complied with the statutory Informing the Accused requirements and that Jackson refused to submit to a blood test,⁵ because

⁵ See WIS. STAT. § 343.305(9)(a)5. and (d) (providing that two of three issues to be determined at a refusal hearing are whether the officer complied with the statutory Informing the Accused requirements, and whether the person refused a blood or other chemical test; as noted above, the third issue is whether there was probable cause to believe that the person was operating a motor vehicle while under the influence).

the State failed to lay a sufficient foundation to authenticate the videotape recording.⁶

¶23 “A [circuit] court’s decision to admit evidence is discretionary, and [the appellate] court will uphold that decision if there was a proper exercise of discretion.... A proper exercise of discretion requires that the [circuit] court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision.” *State v. Manuel*, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811 (citations omitted).

¶24 The circuit court determined that the recording was properly authenticated, based on Olson’s being “a witness with knowledge that the matter is what it claims to be, that is, a squad video from Jacobson’s squad at the time of the transcript,” under WIS. STAT. § 909.015(1). The court reached its conclusion based on Olson’s testimony that “Sergeant Jacobson was driving [Jackson] to the hospital for the purposes of the blood draw ... that the squad video is from Jacobson’s vehicle at the time that he would have been transporting [Jackson] ... that [Olson] recognized the voice on the audio as that of Sergeant Jacobson.”

¶25 Jackson argues that the circuit court erred because the State did not “fulfill[] the requirement[s] set out in” *State v. Curtis*, 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998). In *Curtis*, this court stated that one-party consent tapes “are properly identified and authenticated when a party to the recorded

⁶ Jackson also asserts that the circuit court erred in relying on the videotape. However, Jackson fails to make any argument separate from his argument about authentication in connection with the admissibility of the videotape, or any argument that if the videotape was properly authenticated then the circuit court for some other reason erred in relying on it. Accordingly, I consider only the argument that Jackson does make regarding authentication.

conversation identifies the defendant's voice and testifies that the tapes accurately depict the conversations.” 218 Wis. 2d at 555. Relying on *Curtis*, Jackson contends that Olson did not and could not testify as to the accuracy of the squad car recording here because Olson did not witness it. Relying on a federal case cited in *Curtis*, Jackson also contends that, in the absence of such eyewitness testimony, Olson failed to testify to sufficient facts to establish “the chain of custody” so as to ensure the recording's accuracy. See *United States v. Carrasco*, 887 F.2d 794, 802 (7th Cir. 1989) (stating that “evidence of chain of custody” or “recollections of eyewitnesses ... can establish a tape's foundation” (quoted source omitted)). However, Jackson points to no language in *Curtis* that holds that eyewitness testimony is the only means of authenticating a recording such as the recording at issue here. Further, Jackson's argument based on insufficient facts is easily rejected based on the proper review of the circuit court's discretionary decision to admit the recording in light of the facts of record.

¶26 WISCONSIN STAT. § 909.01 states, “The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” “In other words, as applied here, § 909.01 provides that the [circuit] court, as gatekeeper, must exercise its discretion to determine whether the evidence is sufficient to prove” that the recording was of Jacobson providing the statutorily required information to Jackson and Jackson refusing the blood test, subsequent to Jacobson's arrest of Jackson. See *State v. Baldwin*, 2010 WI App 162, ¶54, 330 Wis. 2d 500, 794 N.W.2d 769.

¶27 WISCONSIN STAT. § 909.015 states, “By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of s. 909.01.” Subsection (1)

provides “[t]estimony of a witness with knowledge that a matter is what it is claimed to be” as one such example.

¶28 The circuit court determined that Olson’s testimony was such testimony. While Olson was not part of the recorded conversation and did not identify Jackson’s voice, he did identify *Jacobson’s* voice and he did identify the markings on the recording as indicating that it was from Jacobson’s squad car at the date and time that Jacobson transported Jackson to the hospital. He additionally testified that only Jacobson and Jackson were in the squad car after Jacobson arrested Jackson and left to take Jackson to the hospital for a blood test. In the recording itself, the voice that Olson testified was Jacobson’s addressed the Informing the Accused information to “Steven,” which is Jackson’s first name. I conclude that the record supports the authentication of the recording.

CONCLUSION

¶29 For the reasons stated, the judgment is affirmed.

By the Court — Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

